



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC RECORDS

FROM: MARY W. DOVE *MWD*
SECRETARY OF THE COMMISSION

DATE: JANUARY 22, 2003

SUBJECT: EX PARTE COMMUNICATION REGARDING
DRAFT AO 2002-14

The Commissioners have received a joint letter from Glen M. Shor, The Campaign and Media Legal Center; Fred Wertheimer, Democracy 21; and Donald J. Simon, Common Cause, commenting on draft Advisory Opinion 2002-14.

Pursuant to 11 CFR 201.4(a), this letter is being placed in the public file of Advisory Opinion 2002-14.

Attachment :

2 pages

January 21, 2003

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2003 JAN 22 A 10: 29

The Honorable Ellen Weintraub, Chair
The Honorable David Mason, Commissioner
The Honorable Danny McDonald, Commissioner
The Honorable Bradley Smith, Commissioner
The Honorable Scott Thomas, Commissioner
The Honorable Michael Toner, Commissioner
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Dear Madame Chair and Commissioners:

The Commission met on Thursday, January 16th to consider the Libertarian National Committee's request for an Advisory Opinion concerning the application of the Bipartisan Campaign Reform Act of 2002 to its practices of renting its mailing lists, selling advertising space in its monthly newsletter, and licensing its trademarks to manufacturers of campaign items. A draft Advisory Opinion prepared by the Commission's Office of General Counsel recommended that such transactions be treated consistently with Commission precedent in this area -- resulting in a finding that payments for these national party assets were subject to the source prohibitions, amount limitations, and reporting requirements for "contributions." Thus, under the Reform Act's national party soft money ban (*see* 2 U.S.C. § 441i(a), 11 CFR § 300.10), such payments could not have been accepted from corporations or unions, among other things. However, the Commission decided that payments to rent the Libertarian National Committee's mailing list would not be subject to the source prohibitions and amount limitations, if reflective of a fair market value fee. It instructed the Office of General Counsel to draft a new Advisory Opinion reflecting this modification (which will apparently be circulated for a tally vote by the Commissioners).

We strongly disagree with the Commission's apparent willingness to depart from its well-grounded precedent and, despite the Reform Act's soft money ban, allow national parties to obtain funds from corporations or unions for their mailing lists. We urge the Commission not to take this approach. If the Commission intends to proceed with this approach, however, we urge it to ensure that its forthcoming Advisory Opinion is limited to the core issue of the permissibility of certain rental payments for national party mailing lists -- and does not more broadly shield arrangements to provide or share a national party's mailing list from scrutiny under other applicable Federal campaign finance laws.

In particular, we believe that a non-party organization's receipt of a national party's mailing list is a factor that may be considered by the Commission in analyzing whether the organization is "directly or indirectly established, financed, maintained or controlled" by the party. Indeed, a combination of receipt of a national party's mailing list and other factors suggestive of establishment, maintenance, or control by the party may appropriately trigger a finding of affiliation under the law. To avoid any conclusion that

this Advisory Opinion precludes Commission consideration of receipt of a national party's mailing list in the course of a separate affiliation analysis, the Commission should expressly indicate that the Opinion reserves judgment on this matter.

In highlighting this issue, we are quite mindful of the involvement of certain national parties in spawning "shadow groups" to carry on the raising and spending of soft money in the 2004 elections (*see* MUR 5338, involving a complaint filed by The Campaign and Media Legal Center, Democracy 21, Common Cause, and the Center for Responsive Politics/FEC Watch concerning two such "shadow groups"). Along these lines, we expect that these national parties may attempt to provide their mailing lists to these organizations to help them amass soft money resources for expenditure on upcoming elections. An express statement to the effect we have suggested (clarifying the limited scope of this proposed Advisory Opinion) would help avoid any possibility that the Opinion could be cited as license or support for schemes to undermine and frustrate the national party soft money ban through the formation or control of "shadow groups," and the sharing of party mailing lists with such groups.

Further, if the Commission proceeds to allow the sale or rental of national party lists when "fair market value" is paid, the Commission should specify exactly how fair market value is to be determined. In this regard, if a national party makes mailing lists available to one purchaser, it should be required to make these lists available to all other willing buyers at the same "market" price. This will help ensure that the price charged is not below fair market value and therefore guard against schemes to evade the new soft money ban through the provision of party lists to favored groups at below-market prices.

Thank you for your consideration of this matter.

Sincerely,



Glen M. Shor
The Campaign and Media Legal Center



Fred Wertheimer
Democracy 21



Donald J. Simon
Common Cause

Cc: The Honorable Lawrence Norton, General Counsel, Federal Election Commission